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In The

Supreme Court of the United States

October Term, 1998

WYOMING DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs.

BEVERLY A. STRAIGHT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICUS CURIAE BUSINESS BANKRUPTCY LAW COMMITTEE, NEW YORK COUNTY LAWYERS' ASSOCIATION, IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The New York County Lawyers' Association (the "Association") is an organization of approximately 9,300 members, which was founded in 1908. The Association and its committees periodically take positions on legal issues and intervene as amicus curiae in cases which are important to the public and legal profession.

The Business Bankruptcy Law Committee of the Association (the "Committee") has become concerned about the effect that the Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996) has had upon the practice of bankruptcy. It has filed *amicus curiae* briefs in support of the constitutionality of section 106 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, in the Third, Fifth, Tenth and Eleventh Circuit Courts of Appeals and has participated in oral argument before the Tenth and Eleventh Circuits, including the present case.

In order to avoid major problems in the practice of bankruptcy, the Committee believes that the constitutionality of section 106 of the Bankruptcy Code needs to be addressed by this Court. This brief is submitted in support of the petition for a writ of certiorari filed by Wyoming (the "Wyoming Petition"). While the Committee's position on the merits of this case may benefit the Respondent, the Committee has no stake in the recovery that any party may receive in connection with the case.[1]

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1. The Committee is simultaneously filing the written consent of Petitioner and Respondent to the submission of this brief. Counsel for a party did not author this brief in whole or in part, and no person or entity other than the Committee, its members or its counsel, have made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Wyoming is asking this Court to resolve a conflict among the federal circuit courts of appeals with respect to the constitutionality of section 106(b) of the Bankruptcy Code in a controversy arising out of a violation of the automatic stay.[2] Section 106(b) defines the extent to which a state waives its Eleventh Amendment immunity by the filing of a proof of claim in bankruptcy.

Congress traditionally had undertaken the delicate task of balancing the competing interests represented by a state's sovereign immunity and the need to administer all of a debtor's assets and liabilities in a centralized proceeding. This Court's opinion in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996) has undermined the authority of Congress in this area, and the Court's decades old decisions involving the adjudication of a state's claim in bankruptcy fail to provide a clear guide. The resulting dangers are reflected not only in the differences among the federal circuit courts of appeals, but also in opinions by courts on all levels, which often reconcile the inherent conflict between Eleventh Amendment immunity and the collective nature of a bankruptcy with rulings which undermine established Eleventh Amendment doctrines.

In addition to the waiver of state sovereign immunity provided in section 106(b), also fully briefed and argued before the Tenth Circuit was the issue of Congress's power to abrogate a state's Eleventh Amendment immunity in section 106(a) of the Bankruptcy Code. These two issues are inextricably linked,

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2. Wyoming also seeks this Court's review of two questions involving the interpretation of the text of section 106(b). The Committee understands that the Respondent shall be filing papers in opposition to the Court's review of these questions, which position the Committee adopts.

because if Congress has the power to abrogate Eleventh Amendment immunity, less reliance upon the doctrine of waiver is required in order to preserve the orderly operation of the bankruptcy system.

The collective nature of a bankruptcy distinguishes the issues in *Straight* from other Eleventh Amendment controversies. By examining the issue of waiver in *Straight* the Court can answer the essential question of what Eleventh Amendment rights are relinquished by a state when a proof of claim is filed. In addressing this question, the Court can determine whether waiver is even a factor, or whether Congress has the power to abrogate a state's Eleventh Amendment immunity in matters involving the Bankruptcy Code's automatic stay.

REASONS FOR GRANTING THE WRIT

I.

AFTER *SEMINOLE TRIBE* NO CLEAR UNDERSTANDING EXISTS ON THE EXTENT TO WHICH STATES ARE SUBJECT TO BANKRUPTCY COURT JURISDICTION.

In 1996 this Court ruled in *Seminole Tribe* that Congress lacked the power under the Commerce Clause in Article I of the Constitution to abrogate a state's Eleventh Amendment immunity. In a footnote, the *Seminole Tribe* Court stated that this same principle was applicable in bankruptcy, but provided no detailed discussion of the issue. *Seminole Tribe*, 116 S. Ct. at 1131 n.16. Thus, a void was created, which the lower courts have been unable to fill.

States are among the most significant parties in bankruptcy. *See* "State Bankruptcy Survey Results," 29 *Bankruptcy Court*

Decisions 21 at 1 (November 19, 1996). However, following this Court's decision in *Seminole Tribe*, lower courts routinely have ruled that the Eleventh Amendment bars a bankruptcy court from asserting jurisdiction over a state in the absence of a state's filing of a proof of claim. *See, e.g., In re Mitchell*, 222 B.R. 877 (BAP 9th Cir. 1998) (bankruptcy court lacks jurisdiction to determine dischargeability of state income tax debt); *In re Christie*, 222 B.R. 64 (Bankr. D. N.J. 1998) (bankruptcy court must vacate prior order voiding state's lien on debtor's exempt property, as no proof of claim filed); *In re Tri-City Turf Club, Inc.*, 203 B.R. 617 (Bankr. E.D. Ky. 1996) (bankruptcy court lacks jurisdiction over action to enjoin state agency from revoking debtor's license in violation of automatic stay). The filing of a proof of claim has become a prerequisite for establishing a bankruptcy court's jurisdiction over a state.

The waiver of Eleventh Amendment immunity triggered by the filing of a proof of claim was recognized by this Court more than half a century ago in *Gardner v. New Jersey*, 329 U.S. 565 (1947). The opinion in *Gardner*, however, does not clearly delineate the extent of that waiver. Prior to this Court's opinion in *Seminole Tribe*, Congress shouldered that burden. Now, as described in the Wyoming Petition, major conflicts have arisen among the federal circuit courts of appeals regarding the consequences which arise from the filing of a proof of claim by a state in bankruptcy.

Central to these differing interpretations is the underlying constitutional question of the extent to which the filing of a proof of claim constitutes a waiver of Eleventh Amendment immunity. As described in the Wyoming Petition, the Tenth Circuit in *Straight* upheld the constitutionality of Congress's definition of the degree of waiver provided in section 106(b) of the Bankruptcy Code, the provision which defines the extent to which sovereign immunity is waived by the filing of a proof

of claim. In contrast, the Fourth Circuit in *In re Creative Goldsmiths of Washington, D.C. Inc.*, 119 F.3d 1140 (4th Cir. 1997) found that under the rule established by this Court in *Seminole Tribe*, Congress's attempt to define waiver in section 106(b) constituted an unconstitutional attempt to abrogate Eleventh Amendment immunity.

The Fourth Circuit, nevertheless, did not deny that some form of waiver was created by the filing of a proof of claim. Instead, it ruled that the filing of a proof of claim subjects a state to suit for a compulsory counterclaim arising from the same transaction which is the subject of the state's proof of claim. However, absent from the *Creative Goldsmiths* opinion is any real justification for why the assertion of a compulsory counterclaim against a state does not violate the Eleventh Amendment. The *Creative Goldsmiths* Court simply reasoned that

> it would violate the fundamental fairness of judicial process to allow a state to proceed in federal court and at the same time strip the defendant of valid defenses because they might be construed to be affirmative claims against the state.

Id. at 1148. Nowhere in the opinion does the Fourth Circuit explain how a bankruptcy court's equitable powers may supersede the dictates of the Eleventh Amendment.

The Eleventh Circuit in *In re Burke*, 146 F.3d 1313 (11th Cir. 1998) adopted an alternative strategy in analyzing the consequences of the filing of a proof of claim. The *Burke* court declined to rely upon the definition of waiver in section 106(b) given this Court's opinion in *Seminole Tribe*. *Id.* at 1317; nor was it willing to accept the compulsory counterclaim rule as a measure for defining a waiver of Eleventh Amendment

immunity. *Id.* at 1320 n.13. Instead, the Eleventh Circuit ruled that where a debtor's claims against a state involve the same taxes as are the subject of a state's proof of claim, and where the recovery sought is limited to costs and attorneys' fees, a bankruptcy court's resolution of the claim falls "easily within the waiver of immunity" established in *Gardner*. However, the *Burke* court failed to provide any definition of the extent of that waiver.

Underlying the opinions in *Straight*, *Creative Goldsmiths* and *Burke* is the understanding that under the rule set forth by this Court in *Gardner*, when a state files a proof of claim, it subjects itself to the jurisdiction of a bankruptcy court. Prior to this Court's opinion in *Seminole Tribe*, the universally accepted limits of that jurisdiction were defined by Congress in the Bankruptcy Code. However, as *Seminole Tribe* has undermined the authority of Congress to define those limits, the federal circuit courts of appeals now require the guidance of this Court in defining this very delicate balance in state and federal power.

Prior to the opinion in *Seminole Tribe*, basic constitutional questions involving the Eleventh Amendment and bankruptcy could remain shrouded. For example, this Court ruled in *New York v. Irving Trust Co.*, 288 U.S. 329 (1933) that sovereign immunity did not bar a state from being subject to a bankruptcy court's order limiting the time within which a claim against a debtor could be filed. However, the *Irving Trust* Court relied simply upon the need for the "orderly" operation of the bankruptcy process. *Id.* at 333; no attempt was made to describe how a state could be subjected to a bankruptcy court's order absent the filing of a proof of claim. This Court's opinion in *Seminole Tribe* now imposes a much more exacting Eleventh Amendment test upon challenges to a state's sovereign immunity in bankruptcy, a test for which the Court's prior opinions fail to provide clear parameters.

For example, in *In re Platter*, 140 F.3d 676 (7th Cir. 1998) the Seventh Circuit Court of Appeals found that a bankruptcy court's most essential power, the authority to discharge a debt, was contingent upon a state's filing of a proof of claim or an equivalent action, *i.e.*, commencing an adversary proceeding to determine the dischargeability of the debt. Similarly, the Fifth Circuit Court of Appeals in *Magnolia Venture Capital Corp. v. Prudential Securities, Inc.*, 151 F.3d 439 (5th Cir. 1998) dismissed an adversary proceeding in which a debtor sought a determination of whether its $11,000,000 account with Prudential Securities was subject to the lien of a state. Although the loan agreement under which the alleged lien was granted included a venue provision agreeing to federal court jurisdiction, the Fifth Circuit ruled that such a waiver was insufficient. It declared that the "Supreme Court has made it clear that we may find a waiver of a state's Eleventh Amendment immunity in only the most exacting circumstances." *Id.* at 443. Similarly, in *Creative Goldsmiths*, the Fourth Circuit declared that given past Supreme Court precedents in non-bankruptcy cases, it was required to narrowly construe the degree to which a state waives its sovereign immunity by the filing of a proof of claim. *Creative Goldsmiths*, 119 F.3d at 1148.

Given the contrast between the reasoning in these cases and the approach adopted below by the Tenth Circuit in *Straight*, it is clear that this Court's guidance is required to resolve the conflict over the extent to which a state waives its Eleventh Amendment immunity by filing a proof of claim in bankruptcy. It now is apparent that the decades old decisions of this Court in *Gardner* and *Irving Trust* no longer suffice in this post *Seminole Tribe* era, in which Congress is viewed by most courts as lacking the power to balance state sovereign immunity and bankruptcy concerns.

II.

THIS COURT'S REVIEW IS REQUIRED TO ELIMINATE THE CONFUSING AND MISLEADING ELEVENTH AMENDMENT PRECEDENTS BEING CREATED IN BANKRUPTCY IN THE POST *SEMINOLE TRIBE* ERA.

Following the opinion in *Seminole Tribe*, numerous courts have recognized the basic conflict between *Seminole Tribe's* broad application of the Eleventh Amendment and "the policy imperatives of federal bankruptcy law." *In re C.J. Rogers, Inc.*, 212 B.R. 265, 276, n.5 (Bankr. E.D. Mich. 1997). Some courts have asserted continued bankruptcy court jurisdiction over a state in ways which violate basic Eleventh Amendment doctrines.

For example, in *Texas v. Walker*, 142 F.3d 813 (5th Cir. 1998), the Fifth Circuit Court of Appeals ruled that the discharge of a debt to a state did not violate the Eleventh Amendment, because it is a state's choice whether to participate in a bankruptcy, while a bankruptcy court possesses the authority to issue an order discharging a debt "by virtue of the Supremacy Clause." *Id.* at 822. The fallacy in that reasoning is that the constitutionality of any act of Congress could withstand an Eleventh Amendment challenge, if the Supremacy Clause were an adequate shield against such an attack.[3]

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3. This is not to suggest that Supremacy Clause issues are not implicated in Eleventh Amendment controversies arising in bankruptcy. For example, in one of this Court's seminal Supremacy Clause opinions, *Perez v. Campbell*, 402 U.S. 637 (1971), it was determined that a state could not condition the restoration of an uninsured debtor's driver's license upon his payment of a judgment arising from an auto accident. Although the *Perez* Court recognized that a state had a legitimate police

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Similar problems have arisen in bankruptcy from an overly broad application of the *Ex parte Young* exception to Eleventh Amendment immunity. For example, in *In re Guiding Light Corp.*, 213 B.R. 489 (Bankr. E.D. La. 1997) the bankruptcy court refused to dismiss a suit brought against the head of the Louisiana Department of Health and Hospitals for wrongfully withholding post-petition payments owing to a debtor. The *Guiding Light* court refused to dismiss the suit, because one of the counts was framed as a request for an order prohibiting the department head from exercising continued control over previously withheld funds. *Id.* at 492. Such a ruling obviously goes beyond the *Ex parte Young* exception allowing for prospective relief, as the suit remained an action seeking direct payment from the state treasury. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 664-671 (1974).

This Court has ruled that actions for any form of relief against a state fall within the scope of the Eleventh Amendment. *See, Missouri v. Fiske*, 290 U.S. 18, 28 (1933). Yet, in *In re Barrett Refining Corp.*, 221 B.R. 795, 807-808 (Bankr. W.D. Okla. 1998), the bankruptcy court ruled that the Eleventh Amendment was inapplicable in bankruptcy. The *Barrett* court concluded that bankruptcy cases were not suits within the meaning of the Eleventh Amendment, as no affirmative

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(Cont'd)
power interest in maintaining highway safety, it ruled that the Supremacy Clause barred a state from not giving full effect to a debtor's discharge in bankruptcy. In contrast, *Seminole Tribe* was interpreted in *In re Perez*, 220 B.R. 216 (Bankr. D. N.J. 1998) to mean that a bankruptcy court lacks the power to order the restoration of a debtor's driver's license (and even to prevent the debtor's incarceration by a municipal judge), because of a failure to pay pre-petition parking tickets, notwithstanding the fact that those debts were being paid under a confirmed chapter 13 plan. This recent *Perez* opinion demonstrates the confusion and threat to comity arising in recent Eleventh Amendment controversies in bankruptcy.

recovery was being sought by a debtor against a state. *Id.* at 807-808. Similarly, in *In re Psychiatric Hosps. of Florida, Inc.*, 216 B.R. 660 (M.D. Fla. 1998), the district court ruled that a motion by a debtor to determine its tax liability to a state was not a suit within the meaning of the Eleventh Amendment.

The clash between the Eleventh Amendment and the operation of the bankruptcy system is clearly illustrated by the decisions in the NVR Homes bankruptcy. In *In re NVR L.P.*, 206 B.R. 831 (Bankr. E.D. Va. 1997) the issue was whether the transfer tax exemption provided by section 1146(c) of the Bankruptcy Code was applicable to various transfers of property made by chapter 11 debtors pursuant to their jointly consolidated plan of reorganization. The *NVR* court ruled that *Seminole Tribe* barred it from even issuing a declaratory judgment with respect to whether the Bankruptcy Code exemption applied. It further warned of the dire consequences that the application of the *Seminole Tribe* doctrine would have in bankruptcy. The *NVR* court observed:

> [A] potentially irreconcilable conflict . . . may now exist between the Bankruptcy Clause and the Eleventh Amendment. Our national bankruptcy system, in which Congress intends debtors to retain the opportunity to reorganize and to obtain a fresh start, may be in grave danger if the states cannot be bound by orders issued by the federal courts under bankruptcy law.

Id. at 843 n.25. On appeal, the district court found a way to remedy this threat to the operation of the bankruptcy law. In *Clerk of Circuit Court v. NVR Homes, Inc.*, 222 B.R. 514, 520-521 (E.D. Va. 1998), the district court ruled that an action by a debtor seeking a declaration of whether a section 1146(c) tax exemption applied was not the type of suit which fell within

the scope of the Eleventh Amendment. Obviously, no declaratory judgment exception to the Eleventh Amendment exists. Such tortured results reflect the type of precedent being created by courts on all levels to protect the operation of the bankruptcy system.

After struggling with the inherent conflicts between the collective nature of a bankruptcy and the ability of a state to frustrate that process by the assertion of its enhanced Eleventh Amendment immunity, one bankruptcy judge concluded:

> Those who have devoted their professional lives and skills to federal law (and those whose jobs depend on the reorganizations and other activities, that the process contemplates) are anxious for instruction about what is Constitutionally permissible.

In re Zywiczynski, 210 B.R. 924, 933-934 (Bankr. W.D. N.Y. 1997). More than two years have passed since this Court described in dicta that Congress lacked the power to abrogate a state's Eleventh Amendment immunity in bankruptcy; yet, the lower courts still lack the necessary guidance in understanding the constitutional limits on a state's participation in the bankruptcy process. This uncertainly is breeding a confused set of precedents, which threaten to cloud the application of Eleventh Amendment doctrines in other areas of the law.

III.

THIS COURT SHOULD DECIDE WHETHER THE ELEVENTH AMENDMENT BARS THE BANKRUPTCY CODE'S ABROGATION OF STATE SOVEREIGN IMMUNITY IN MATTERS INVOLVING THE AUTOMATIC STAY.

Underlying the confusing Eleventh Amendment precedents arising in bankruptcy is the inability of a collective process to operate properly, where a critical participant, the states, can exclude themselves by asserting their Eleventh Amendment immunity.

The issue of whether Congress has the power to abrogate a state's Eleventh Amendment immunity was decided by the bankruptcy court and district court in *Straight*, and was fully briefed and argued before the Tenth Circuit below.[4] Thus, ripe for decision is the question of whether Congress has the right to abrogate a state's Eleventh Amendment immunity. *See United States v. Williams*, 504 U.S. 36, 41 (1992); *see also, Carlson v. Federal Bureau of Prisons*, 446 U.S. 14, 17 n.2 (1980) (Court may decide questions not raised below in the interest of judicial administration).

The presence of the issue of waiver in *Straight* will aid this Court in its consideration of the question of abrogation, because a careful consideration of Eleventh Amendment immunity in bankruptcy should encompass the alternative basis

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4. The bankruptcy and district courts ruled that the abrogation of sovereign immunity in section 106 of the Bankruptcy Code reflected an exercise of Congress's power under the Fourteenth Amendment, the position advocated by the Respondent. The Committee argued before the Tenth Circuit that the power to abrogate a state's sovereign immunity was inherent in the Bankruptcy Clause of the Constitution.

for jurisdiction provided by the doctrine of waiver. *Straight* provides a particularly useful vehicle for the analysis of this issue, because it also allows for consideration of the narrower question of whether the Eleventh Amendment bars the abrogation of state sovereignty in section 106(a) of the Bankruptcy Code with respect to the automatic stay.

Wyoming is seeking a reversal of the lower court's order for costs and attorneys' fees arising from the state's violation of the automatic stay, an injunction arising upon the filing of a petition in bankruptcy. The automatic stay is recognized as a fundamental protection provided by the Bankruptcy Code. 11 U.S.C. § 362(a). *See Midlantic Nat'l Bank v. New Jersey Dep't Envntl. Protection*, 474 U.S. 494, 503 (1986). It furthers the basic bankruptcy policy of providing an equal distribution of a debtor's assets among its creditors by enjoining all entities from taking any action to control a debtor's property or collect a pre-petition debt. *In re Parr Meadows Racing Assoc.*, 880 F.2d 1540, 1545 (2nd Cir. 1989), *cert. denied, sub nom., Suffolk County Treasurer v. Barr*, 493 U.S. 1058 (1990). Thus, when a state's sovereign immunity is successfully asserted to bar enforcement of the automatic stay, more than the rights of a single debtor is affected. The rights of all of a debtor's creditors are prejudiced. It is for this reason that the Tenth Circuit's analysis in *Straight* began with a description of the basic bankruptcy principle that all creditors in the same class are to be treated alike. *Straight*, 143 F.3d at 1389. It also is for this reason that no court apparently has ever denied a debtor the right to seek affirmative relief against a state in bankruptcy by the assertion of a compulsory counterclaim, the general rule of sovereign immunity outside of bankruptcy. *See* 3 *Moore's Federal Practice 3d* ¶ 13.50 [4] (1998).

Since its opinion in *Seminole Tribe*, this Court has shown a willingness to consider Eleventh Amendment questions

comparable to the issues presented by *Straight*. For example, in its recent decision in *Wisconsin Dept. of Corrections v. Schacht*, __ U.S. __, 118 S. Ct. 2047 (1998), this Court refused to accept a previously recognized broad application of Eleventh Amendment immunity requiring the dismissal of a case removed by a state to federal court after the claims against the state are dismissed on Eleventh Amendment grounds, notwithstanding the existence of nonbarred claims for relief against individual defendants. Justice Kennedy stated in his concurring opinion in *Schacht* that the Court should consider in some later case whether a state waived its Eleventh Amendment immunity by choosing to remove a case to federal court. *Id.* at 2055-2057. He recognized that such an action by a state was akin to the filing of a proof of claim in bankruptcy. *Id.* at 2056.

Even more significant was this Court's recognition of an in rem exception to Eleventh Amendment immunity in admiralty cases in *California v. Deep Sea Research, Inc.*, __ U.S. __, 118 S. Ct. 1464 (1998). Under the former Bankruptcy Act, a bankruptcy court's jurisdiction over the property of a debtor was used to define a bankruptcy court's jurisdiction to decide a controversy.

Several federal circuit courts of appeals appear to have implicitly recognized an in rem exception to Eleventh Amendment immunity in bankruptcy. For example, in *Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777 (4th Cir. 1997), the Fourth Circuit found that a state was bound by the transfer tax exemption provided in an order confirming a chapter 11 plan. The *Antonelli* court responded to an Eleventh Amendment challenge by claiming that the power to issue the confirmation order was derived from the bankruptcy court's jurisdiction over the debtor and its estate, "not from jurisdiction over the state." *Id.* at 787. The distinctive position a bankruptcy court holds because of its jurisdiction over the property of a

debtor also was recognized by the Fifth Circuit Court of Appeals in *Walker*, 142 F.3d at 822.

Neither of these circuit courts of appeals would explicitly recognize the existence of an in rem exception to Eleventh Amendment immunity in bankruptcy, given this Court's broad statement of principle in *Seminole Tribe* and its prior rulings in *United States v. Nordic Village Inc.*, 503 U.S. 30, 39 (1992) (no in rem exception exists to sovereign immunity bar against monetary recovery), and *Fiske*, 290 U.S. at 28 (no in rem exception to Eleventh Amendment immunity exists). *See also In re Fernandez*, 123 F.3d 241, 243-245 (5th Cir. 1997) (*Seminole Tribe* bars Congress from abrogating state sovereign immunity in the Bankruptcy Code); *In re Sacred Heart Hosp. of Norristown*, 133 F.3d 237, 243-244 (3rd Cir. 1998) (*Seminole Tribe* bars Congress from abrogating state sovereign immunity in the Bankruptcy Code). Thus, by addressing the Eleventh Amendment abrogation issue in *Straight*, this Court can provide direction to the lower courts in addressing not only the automatic stay, but also the issuance of other orders whose collective nature is the particular province of bankruptcy, such as orders confirming a chapter 11 plan or discharging a debtor's liabilities. It is apparent that some type of abrogation of sovereign immunity is required; otherwise, such essential bankruptcy court orders would be ineffective against a state which failed to file a proof of claim. The courts below recognize this basic problem, but only this Court has the authority to define the constitutional basis for imposing such a limitation on the Eleventh Amendment rights of a state.

In *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S. Ct. 2028 (1997), this Court recognized that the resolution of Eleventh Amendment controversies may involve a balancing of interests. *Id.* at 2038. Such an approach is consistent with this Court's past recognition of "the delicate adjustments required by our federalism." *Toucey v. New York Life Insurance*

Co., 314 U.S. 118, 141 (1941). After *Seminole Tribe*, only this Court has the authority to give direction to the lower courts in striking the delicate balance which must be established in resolving the inherent conflict between a state's Eleventh Amendment rights and the federal bankruptcy power.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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